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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:	)	Chapter 13 Proceedings
	)	Case No: 09-25653-LBR
NATHAN NOWERY,	)	
	)	
Debtor(s).	)	DATE: 12/03/2009
	)	TIME: 2:30 p.m.

**MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS OF  
GMAC PURSUANT TO 11 U.S.C. §506(a) AND §1322.**

COMES NOW, Debtor NATHAN NOWERY ("Debtor"), by and through his attorney, MATTHEW AARON, of the law firm of AARON & PATERNOSTER LTD., and hereby move this Court to modify the rights of GMAC ("GMAC") pursuant to 11 U.S.C. §506(a), and §1322, and Bankruptcy Rules 3012 and 9014. This Motion is based on the following Memorandum of Points and Authorities, the attached Exhibits, all papers and pleadings on file herein, and any other argument or evidence permitted by the Court.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**STATEMENT OF FACTS**

Debtor filed the instant Chapter 13, Case Number 09-25653-LBR, on or about August 25, 2009. On or about the petition date, Debtor owned real property located at or about 136 Spinnaker Drive, Henderson, Nevada 89015 ("Property"). The value of the Property is approximately \$156,146.00.<sup>1</sup> At the time Debtor filed his Petition, and currently, the first mortgage held by AMERICA'S SERVICING CO, ("ASC") is in the approximate amount of \$233,366.48<sup>2</sup>. The

<sup>1</sup> See copy of estimate from Cyberhomes.com attached hereto as Exhibit A.

<sup>2</sup> See Proof of Claim Form B10 (Proof of Claim 10-1) attached hereto as Exhibit B.

1 second mortgage, held by GMAC, is in the approximate amount of \$58,817.00. As of the date of  
2 this filing, GMAC has not filed a proof of claim for the second mortgage. On or about the date  
3 Debtor filed the instant bankruptcy, no equity existed in the Property above the lien held by  
4 AMERICA'S SERVICING COMPANY for its first mortgage. GMAC'S second mortgage claim  
5 was wholly unsecured on the petition date and if the Property was sold at auction, GMAC would  
6 receive nothing for said second mortgage claim.

## 7 II.

### 8 LEGAL ARGUMENT

9 A wholly unsecured lien holder's claim can be modified and reclassified as a general  
10 unsecured claim pursuant to 11 U.S.C. § 506(a), despite the anti-modification language in §  
11 1322(b)(2).<sup>3</sup> The 9<sup>th</sup> Circuit reviewed and discussed *Nobelman v. American Savings Bank*, 508 U.S.  
12 324 (1993) regarding claims "secured" by real property, and the subsequent majority and minority  
13 interpretation and application thereof.<sup>4</sup> Based on its thorough analysis, the 9<sup>th</sup> Circuit found the  
14 majority interpretation and application of *Nobelman* to 11 U.S.C. § 506 and § 1322 compelling and  
15 held:

16 Section 506(a) divides creditors' claims into 'secured . . . claims' and 'unsecured  
17 claims.' Although the conventional interpretation of 'secured' might include any  
18 claim in which the creditor has a security interest in the debtor's property, § 506 (a)  
19 makes clear that the status of a claim depends on the valuation of the property. An  
20 allowed claim of a creditor secured by a lien on property in which the estate has an  
21 interest . . . is a secured claim to the extent of the value of such creditor's interest  
22 in the estate's interest in such property . . . and is an unsecured claim to the extent  
23 that the value of such creditor's interest . . . is less than the amount of such allowed  
24 claim. Put more simply, a claim such as a mortgage is not a 'secured claim' to the  
25 extent that it exceeds the value of the property that secures it. Under the Bankruptcy  
26 Code, 'secured claim' is a term of art and not every claim that is secured by a lien  
27 on property will be considered a 'secured claim.'<sup>5</sup>

28 Here, GMAC'S second mortgage claim for the repayment is an unsecured claim because  
its deed of trust is junior to the first deed of trust, and the value of the loan secured by the first deed  
of trust is greater than the value of the Property. Because GMAC'S second mortgage claim is  
wholly unsecured (no equity exceeding the first mortgage on the Property exists), Debtor

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<sup>3</sup> *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1222-23.

1 respectfully requests this Court classify GMAC'S second mortgage claim to that of a general  
 2 unsecured creditor to be paid pro rata with like unsecured creditors. Additionally, Debtor requests  
 3 this Court strip GMAC of its secured rights, if any, for its second mortgage claim under State law  
 4 because no maintainable security interest in the Property exists as to the second mortgage.  
 5 Furthermore, an adversary proceeding is not required to obtain the relief requested herein. Debtor  
 6 needs only request the relief sought herein by motion to "strip off" GMAC'S consensual second  
 7 mortgage/secured credit line lien.<sup>6</sup>

### 8 III.

### 9 CONCLUSION

10 WHEREFORE, based on the foregoing, Debtor respectfully requests this Court: 1) "strip  
 11 off" and extinguish GMAC'S wholly unsecured second mortgage lien pursuant to 11 U.S.C.  
 12 §506(a) upon completion of Debtor's Chapter13 Plan payments; 2) Reclassify GMAC'S second  
 13 mortgage claim as a general unsecured claim to be paid pro rata with claims of other general  
 14 unsecured creditors through Debtor's Chapter 13 plan; and 3) other relief the Court deems just,  
 15 equitable and/or appropriate.

16 Dated this 23<sup>rd</sup> day of October, 2009.

17 By: /s/ MATTHEW AARON  
 18 MATTHEW E. AARON, ESQ.  
 19 Nevada Bar #004900  
 20 Attorney for Debtor(s)

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 27 <sup>6</sup> See *In re Williams*, 166 B.R. 615 (Bankr.E.D.Va.1994), *In re Fuller*, 255 B.R. 300  
 28 (Bankr.W.D.Mich.2000), *In re Hoskins*, 262 B.R.693 (Bankr.E.D.Mich.2001), *In re King*, 290  
 B.R.641 (Bankr.C.D.III.2003), *In re Millspaugh*, 302 B.R.90 (Bank.D.Idahp2003), *Dickey v.*  
*Ben.Fin (In re Dickey)*, 293 B.R.360 (Bank.M.D.Pa.2003), *In re Hill*, 304 B.R.800  
 (Bankr.S.D.Ohio2003), *In re Sadala*, 294 B.R.180 (Bankr.M.D.Fla.2003), *In re Fisher*, 289 B.R.  
 544 (BankrW.D.N.Y.2003), *In re Robert*, 313 B.R.843 (Bankr.W.D.Ky.2004).

**EXHIBIT “A”**

**cyberhomes** Find the right neighborhood. Find the right home.

Home

136 Spinnaker Dr, Henderson, NV 89015



Estimate:

**\$156,146**

Change over last month:

**+\$3,686**

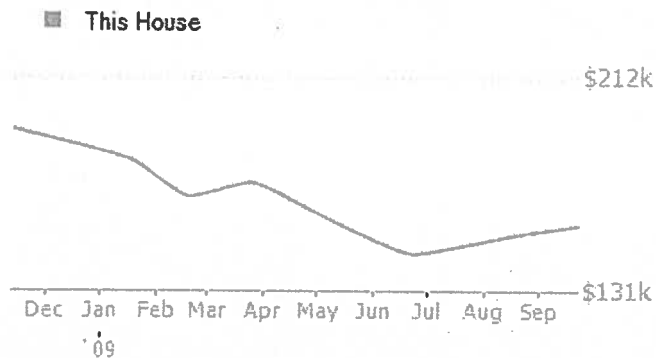
Estimate range: \$140,531 - \$179,567

Last Updated: 9/23/2009

**Home facts**

Bedrooms:	3
Bathrooms:	3
LivingArea:	1,545 Sq ft
Lot Size:	5,663 Sq ft
Type:	Single Family
Parcel Number:	179-09-414-019
County:	Clark
Year Built:	1986
Total Rooms:	7
Heating:	Forced air unit
Cooling:	Central
Number of Stories:	2
Legal Description:	PLAT BOOK 32 PAGE 38 LOT 39 BLOCK 4

**Estimated Home Value**



**Sales History**

Sale Date	Sale Amount	Price per Living Area
2/21/2007	\$292,000	\$189.00
12/22/2004	\$245,000	\$158.58
8/6/2003	\$150,000	\$97.09

**Assessed Values**

Year	Improve-ments	Land	Total
2008	\$32,392	\$28,210	\$60,602
2007	\$31,110	\$39,550	\$70,660
2006	\$31,215	\$31,150	\$62,365

View this property at: <http://www.cyberhomes.com/homes-henderson-nv-89015/136spinnakerdr/30690384.aspx> (Report created on: 10/22/2009)

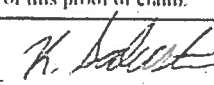
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**EXHIBIT “B”**



<b>UNITED STATES BANKRUPTCY COURT DISTRICT OF NEVADA</b>		<b>PROOF OF CLAIM 13</b>
Name of Debtor Nathan Nowery	Case Number 09-25653-lbr	<i>(This space for court use)</i>
NOTE: This form should NOT be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. Section 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property)  U.S. Bank National Association, as Trustee for Deutsche Alt-A Securities Mortgage Loan Trust Series 2007-2	<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.	
Name & address where notices and payments should be sent: America's Servicing Company One Home Campus, MAC ID#X2302-04C Des Moines, IA 50328		
Account or other number by which creditor identifies debtor: 1158070240 / 09-72785	Check here if this claim <input type="checkbox"/> replaces <input type="checkbox"/> amends a previously filed claim, dated _____	
<b>1. BASIS FOR CLAIM</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input checked="" type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other _____		
<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (FILL OUT BELOW) Your Social Security # _____ Unpaid compensation for services performed from _____ (date) _____ To _____ (date) _____		
<b>2. Date debt was incurred:</b> February 15, 2007 <b>3. If court judgment, date obtained:</b> _____		
<b>4. Total amount of claim at time case filed:</b> \$233,366.48 If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach an itemized statement of all interest or additional charges.		
<b>5. Secured Claim.</b> <input checked="" type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff)  Brief description of collateral: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____  Amount of arrearages and other charges at time case filed included in secured claim, if any:  \$18,137.28* * Arrearages, as set forth in Schedule "A" attached. Plus accruing interest, late charges.	<b>6. Unsecured Priority Claim.</b> <input type="checkbox"/> Check this box if you have an unsecured priority claim. Amount entitled to priority \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions up to \$4,650* earned within 90 days before filing of the bankruptcy petition, or cessation of the debtor's business, whichever is earlier- 11 U.S.C. § 507(a)(3) <input type="checkbox"/> Contributions to an employee benefit plan- 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease or rental of property Or services for personal, family or household use- 11 U.S.C. § 507(a)(6) <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child- 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or penalties owed to governmental units, 11 U.S.C. § 507(a)(8) <input type="checkbox"/> OTHER-Specify applicable paragraph of 11 U.S.C. § 507(a)(____) <small>*Amounts are subject to adjustment on 4/1/98 and every three years thereafter with respect to cases commenced on or after the date of adjustment.</small>	
<b>7. Credits:</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. <b>8. Supporting documents:</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. <b>9. Date-Stamped copy:</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and a copy of this proof of claim.		<i>(This space for court use)</i>
Date: September 10, 2009 <div style="text-align: right; margin-top: 10px;">             WILDE &amp; ASSOCIATES, counsel for creditor         </div>		
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571		

Nathan Nowery  
CASE NO: 09-25653-lbr

**SCHEDULE "A"**

**PRINCIPAL BALANCE \$233,366.48**

**ARREARAGES**

11 Monthly payments at \$1,332.33 (Oct 1, 2008-Aug	\$14,655.63
Accrued late charges	\$466.72
Attorney foreclosure fees and costs	\$2,449.10
Property preservation fee	\$65.00
Property inspection fee	\$30.00
Escrow shortage	\$470.83
<b>TOTAL*</b>	<b>\$18,137.28</b>

**\*TOTAL GOOD THROUGH August 25, 2009**

**\*\*\*NOTE: THE TOTAL DEBT IS THE SUM OF THE ARREARAGES  
AND THE PRINCIPAL BALANCE, LESS ANY PORTION OF THE  
ARREARAGES WHICH UNDER THE TERMS OF THE LOAN  
WOULD BE APPLIED AS A REDUCTION OF THE PRINCIPAL.**



**CERTIFICATE OF SERVICE**

On October 23, 2009, I served the following document(s)

Notice of Hearing on Motion To Value Collateral, "Strip Off" and Modify Rights of  
GMAC Pursuant to 11 U.S.C §506(a) and §1322; Motion To Value Collateral, "Strip  
Off" and Modify Rights of GMAC Pursuant to 11 U.S.C. §506(a) and §1322.

2. I served the above-named document(s) by the following means to the persons as listed below:

☒ a. ECF System (You must attach the "Notice of Electronic Filing", or list all persons and addresses and attach additional paper if necessary.)

Trustee Kathleen Leavitt: courtsecf3@las13.com

☒ b. United States mail, postage fully prepaid, addressed as follows:  
(List persons and addresses. Attach additional paper if necessary.)

Certified Mail:

GMAC  
Agent, Officer or Managing Partner  
P O Box 12699  
Glendale, AZ 85318

Regular Mail:

NATHAN NOWERY  
136 Spinnaker Drive  
Henderson, NV 89015

☐ c. Personal Service (List persons and addresses. Attach additional paper if necessary)

I personally delivered the document(s) to the persons at these addresses:

☐ For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the documents(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the documents(s) in a conspicuous place in the office.

☐ For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

☐ d. By direct email (as opposed to through the ECF System)  
(List persons and email addresses. Attach additional paper if necessary)

Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below.

I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ e. By fax transmission (List persons and fax numbers. Attach additional paper if necessary)

1 Based upon the written agreement of the parties to accept service by fax transmission or  
2 a court order, I faxed the document(s) to the persons at the fax numbers listed below. No  
error was reported by the fax machine that I used. A copy of the record of the fax  
transmission is attached.

3  
4 o f. By messenger (List persons and addresses. Attach additional paper if necessary)  
I served the document(s) by placing them in an envelope or package addressed to the persons  
at the addresses listed below and providing them to a messenger for service. (A declaration  
by the messenger must be attached to this Certificate of Service,).

6 I declare under penalty of perjury that the foregoing is true and correct.

7 Signed on: October 23, 2009.

8  
9   
An employee of Aaron & Paternoster, Ltd